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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 973.

ALLAN W. BATH

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the trial Court (Appendix A of petition) is unreported. The opinion of the Supreme Judicial Court of Massachusetts (Appendix, *infra*, p. 8) is reported at Massachusetts Advance Sheets (1964) pp. 1213-1217.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code, § 1257 (3), on the theory that he was denied a right claimed under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Question Presented.

Whether a corporate officer who personally causes the corporation to violate a criminal statute can insulate him-

self from personal responsibility for such crime by invoking the protection of the Due Process Clause of the Fourteenth Amendment.

Statute Involved.

The statute involved, chapter 268, § 14A, of the General Laws of Massachusetts, is as follows:

> "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

Statement.

This criminal prosecution stems from the discharge by the appellant Allan W. Bath, vice-president for manufacturing of John Bath & Company, Incorporated, of one Ronald Larson, a traverse juror, for failing to report to work between 7:30 and 9:15 a.m. on days when his services were required as a juror. The circumstances surrounding Larson's discharge are set out clearly and concisely in the opinion of the trial Court at pages 15-17 of the petition and need not be repeated here. The complaint under which the defendant Allan W. Bath was convicted and fined is set out at pages 4-5 of the petition.

After his conviction, Bath petitioned for a writ of error to the Massachusetts Supreme Judicial Court (R. 1-34).

On October 30, 1964, the Supreme Judicial Court handed down its decision affirming the judgment of the Superior Court (R. 56-51). The petitioner subsequently applied for a rehearing (R. 41-47), in which for the first time he alleged that he had been deprived of a constitutional right. The application for rehearing was denied, and this petition was brought.

Argument.

The issue sought to be raised on this petition is a long-settled and insubstantial one, which no amount of eloquent argumentation can convert into a question worthy of this Court's consideration on certiorari. The holding of the Massachusetts Supreme Judicial Court amounts to nothing more nor less than the well-settled proposition that a corporate officer can be held personally responsible for criminal acts of the corporation which he orders and controls. The other issue which the petitioner seeks to raise, *i.e.*, whether one indicted for a statutory contempt can be convicted of common-law contempt, relates only to some superfluous dicta and is entirely extraneous to the holding of the Court in this case. In any event, none of the federal rights here claimed were timely or properly raised in the Court below.

I. The Decision Below is Clearly Correct.

The petitioner urges that the juror Larson was employed by John Bath & Company, Inc., and not by Allan W. Bath individually, and that consequently the individual defendant cannot be found to have violated the statute.

This contention is without merit, as the trial Court pointed out in its opinion (Petition, p. 19): "It is clear from the facts found that Allan W. Bath was, throughout,

the person in control of the action of the corporation in the discharge of Larson." The respondent respectfully submits that the petitioner's conviction is clearly supported by numerous federal cases.

The criminal responsibility of a corporate officer who assists a corporation to commit a crime was eloquently articulated by the late Mr. Justice Frankfurter in *United States* v. *Dotterweich,* 320 U.S. 277, 281, 283-284. Other federal cases to the same effect are *Maternity Trousseau, Inc.,* v. *Maternity Mart of Baltimore, Inc.,* 196 F. Supp. 456; *United States* v. *Harvey,* 54 F. Supp. 910. See also *Wilson* v. *United States,* 221 U.S. 361, 376, and *Parker* v. *United States,* 126 F. 2d 370, 379; and *Commissioners* v. *Sellew,* 99 U.S. 624, 627, holding that the contempt of the corporation is as well the contempt of the corporate agent who commits the contemptuous act.

II. The Federal Claims Now Asserted were Not Properly Raised in the State Court.

It is mandatory in a petition for certiorari that the petitioner make ". . . specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised . . ." Rule 23 (1) (f). *New York Central Railroad Co.* v. *New York,* 186 U.S. 269, 273. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655. Not only must the federal question have been raised in the state Court, but it must have been raised at the proper point. *Godchaux Co., Inc.,* v. *Estopinal,* 251 U.S. 179, 181. *Brown* v. *Massachusetts,* 144 U.S. 573, 580. There is nothing in the record of the proceedings in the trial Court or in the Supreme Judicial Court to indicate that any federal right was ever asserted until the application for rehearing, following the opinion of the Supreme

Judicial Court, when the petitioner for the first time claimed that he had been deprived of due process under the Fourteenth Amendment.

This Court has said that it will decline to take jurisdiction where the opinion of the highest state Court is completely silent on the federal question, *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291, 309, unless it can be affirmatively shown that the silence of the state Court is not due to any procedural deficiency. *Bailey* v. *Anderson,* 326 U.S. 203, 206-207. The petitioner's failure to make any reference to claim of any federal right at trial or in his assignment of errors in the petition for writ of error operates as a waiver of any such claim. *Beck* v. *Washington,* 369 U.S. 541, 563.

Raising a federal question for the first time in a petition for rehearing addressed to the highest state Court is insufficient to provide a basis for certiorari jurisdiction unless the state Court actually entertained the petition and expressly decided the question. *Radio Station WOW, Inc.,* v. *Johnson,* 326 U.S. 120, 128. *Hanson* v. *Denckla,* 357 U.S. 235, 243-244. *Herndon* v. *Georgia,* 295 U.S. 441, 443. Nor can the petitioner maintain that the decision of the Supreme Judicial Court of Massachusetts was a surprise which could not have been reasonably anticipated from prior decisions, since the principle is well established in this Commonwealth that whoever aids or counsels another in disobeying a judicial decree is himself guilty of contempt. *Commonwealth* v. *Hudson,* 315 Mass. 335, 345. *Alves* v. *Braintree,* 341 Mass. 6, 12.

Clearly, the petitioner has not complied with the mandate of section 1257 (3) that the federal right asserted must have been "specially set up or claimed" in the Court below, which in itself constitutes sufficient reason for denying this petition.

III. The Decision of the Court Below Rests upon an Adequate Non-Federal Basis.

The petitioner finds ambiguity in the opinion of the Supreme Judicial Court and alleges that his conviction may have been sustained by that Court on the theory that, while he may not have violated the statute, he was nevertheless guilty of a common-law contempt.

Such an interpretation does violence to the clear language of the Court and ignores the explicit holding of the case. That holding reads in part as follows:

> "The judge found that Larson could not have reasonably been expected adequately to perform both his jury duty and the employment requirements and that, under all the circumstances, the conditions imposed by the employer were unreasonable. He stated the view that jurors must be free of compulsory nonjury assignments under threat of discharge inasmuch as any such assignment might interfere with the juror's availability or his peace of mind. The judge construed the statute as a command to those individuals within the corporation who act for it and ruled that the contempt of the corporation was Bath's contempt also. He ruled that the violation of the statute by the petitioners was derogatory of the proper administration of justice. *The judge found that both petitioners had wilfully violated the statute.*
>
> "The review is limited to questions of law apparent on the record. *New England Novelty Co. Inc.* v. *Sandberg*, 315 Mass. 739, 747-748, and cases cited (cert. den. 323 U. S. 740; rehearing den. 323 U. S. 815). *Hansen* v. *Commonwealth*, 344 Mass. 214, 222. *No error is shown.*" (Emphasis added.) Appendix, *infra*, p. 10.

The Court's subsequent observation that Bath's violation "was a contempt apart from the statutory specification of the employer's contempt" is nothing more than a dictum, and is in no way essential to the affirmance of the lower court's judgment of conviction.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,

WARREN K. KAPLAN,
Assistant Attorney General.

[Appendix follows.]

Appendix.

Massachusetts Advance Sheets, Pages 1213-1217.

JOHN BATH & COMPANY, INC. & another *vs.* COMMONWEALTH.

Suffolk. October 7, 1964.—October 30, 1964.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

WHITTEMORE, J. The petitioners for writ of error, John Bath & Company, Inc., and Allan W. Bath, its vice-president, seek to have set aside judgments of the Superior Court of May 7, 1962, holding them in contempt for discharging an employee for refusing to work while on jury service. The case was reserved and reported by a single justice.

The complaints for contempt are entitled "Complaint Contempt of Court under G. L. c. 268, § 14A." This statute provides: "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

The return includes the findings and rulings of the judge of the Superior Court. Ronald K. Larson, the discharged employee, reported for jury service in Worcester on April 2, 1962, having heretofore told his foreman of the call for jury duty. The jury session was to continue to May 4, 1962. On the evening of April 3, the foreman directed Larson to report for work between the hours of 7:30 A.M. and 9:15 A.M. each day during his jury service. Larson replied

in substance that the circumstances did not permit this and declined to comply. On April 5, Larson received by registered mail a letter on the letterhead of the corporation signed by Bath as "Vice President—Mfg." directing him, on penalty of disciplinary action or discharge, to report for work as ordered by the foreman. There followed two conversations between Larson and Bath, in each of which the direction under penalty of discharge was repeated and Larson protested his inability to comply. The second of these conversations was in the presence of labor union officials at the company plant on April 19. On April 23, Larson received another registered letter from Bath as "Vice President—Mfg." notifying him of his discharge for "repeated insubordination" in failing to obey directions "to report for work mornings from 7:30 A.M.—9:15 A.M. while serving on jury duty."

Larson's place of employment was three miles from the court house in Worcester and about seven miles from his home in Millbury. His workday began at 7:30 A.M. Normally he operated a grinding machine and was subjected to a considerable spattering of oil and an oil mist from the flow of lubricating oil upon the grinding wheel. After any appreciable working time, Larson had oil on his shoes, clothes, and person. There were at the plant no bathing facilities and only limited washing facilities available for employees' use. Hot water was seldom provided.

The judge found that Larson could not have reasonably been expected adequately to perform both his jury duty and the employment requirements and that, under all the circumstances, the conditions imposed by the employer were unreasonable. He stated the view that jurors must be free of compulsory nonjury assignments under threat of discharge inasmuch as any such assignment might interfere with the juror's availability or his peace of mind. The judge construed the statute as a command to those indi-

viduals within the corporation who act for it and ruled that the contempt of the corporation was Bath's contempt also. He ruled that the violation of the statute by the petitioners was derogatory of the proper administration of justice. The judge found that both petitioners had wilfully violated the statute.

The review is limited to questions of law apparent on the record. *New England Novelty Co. Inc.* v. *Sandberg,* 315 Mass. 739, 747-748, and cases cited (cert. den. 323 U. S. 740; rehearing den. 323 U. S. 815). *Hansen* v. *Commonwealth,* 344 Mass. 214, 222. No error is shown.

The petitioners contend that the subsidiary findings show that Larson was discharged for insubordination rather than because of his "attendance or service" as a juror, so that it was error in law to find violation of the statute. They ask us, in effect, as we understand their position, to rule that there was in the requirement that Larson work each day before going to court no necessary interference with jury duty, that it is inferable that the requirement would have been reasonably enforced by the employer so as not to cause any such interference, and that Larson's refusal to comply was not because of anticipated inability, but rather because of an unreasonable insistence on jury duty as an excuse for not working.

The issue, however, is not whether the employee might have worked each morning without impairing his effectiveness as a juror. The issue, as we view it, is whether the work requirements imposed upon the employee risked impairment of that effectiveness. Imposition of such risk was an interference with a juror's primary obligation, his jury service. Such interference was an interference with the proper functioning of the court.

Larson, rightly, as it turned out in view of the judge's findings, acted on the assumption that his "service as a

. . . juror" was incompatible with his working every day from 7:30 A.M. to 9:15 A.M. When the employer discharged him for not working every day, it discharged him because he had acted rightly to keep his obligation to perform jury service paramount. That was discharge because of "service as a . . . juror" within the meaning of the statute.

We do not agree with the petitioners that the sole basis of the judgments below is the judge's conclusion that any work requirement even though it would not risk impairment of the employee's effectiveness as a juror, assuming a discharge for a violation thereof, would be a violation of G. L. c. 268, § 14A. We need not determine whether there might be requirements of an employer for sporadic, emergency or other work by the employee that would be so plainly compatible with the employee's jury service that sanctions could be imposed by the employer.[1] But here the issue is narrowed by the judge's finding that the requirement imposed on Larson was unreasonable. This supports the conclusion that the requirement interfered with the functioning of the court.

The petitioner Bath contends that he was not in contempt of court because the statute makes only a violation by the employer a contempt.

The statute gives legislative recognition to the proposition that discharging an employee because of jury duty would be interference with the court. Apart from the statute's declaration that violation of its terms is contempt, the court would have power to punish such interference. See *Cartwright's Case*, 114 Mass. 230, 238; *New England Novelty Co. Inc.* v. *Sandberg*, 315 Mass. 739, 746; *People* v.

[1] Certainly, in any case, the course of prudence would be for the employer or employee or both to refer any doubts to the judge to whom the juror is responsible in his paramount obligation and who alone is empowered to excuse a juror from the full performance of the duty to which he has been summoned.

Huggins, 258 Ill. App. 238, 243; *People* v. *Vitucci,* Ill. App. 2d , .* The officer or employee is himself interfering with the court when he causes the employer to act. See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347 (violation of court decree). The Legislature has not undertaken to limit the court's power otherwise existing to deal with Bath's contempt. Such an attempt would raise a serious constitutional question. *Opinion of the Justices,* 314 Mass. 767, 782.

It is inconsequential that this complaint and the judge's rulings made no reference to the power of the court to punish for a contempt apart from the statute. It is enough that the complaint alleged that Bath, as vice-president of the corporation, discharged Larson because of his service as a traverse juror and that Bath thereby committed a contempt of court, and that the findings establish that Bath did act as the effective agent of the corporation in causing the discharge. In so acting for the corporate employer Bath himself violated the mandate: "No person shall be discharged . . . because of his . . . service as a . . . juror . . . ." See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347; *Wilson* v. *United States,* 221 U. S. 361, 376-377. The reference to the statute in the title of the complaint can require no more than that Bath's violation of the statute be shown. *Woodbury* v. *Commonwealth,* 295 Mass. 316, 323. Such violation was a contempt apart from the statutory specification of the employer's contempt.

The findings of subsidiary facts do not show whether the petitioners knew of the statute. The petitioners do not contend that there was error in law in the judge's finding of wilful violation and we discern none. The finding in context means, we think, that the petitioners, by their inten-

* 199 N. E. 2d 78, 79.

tional acts, assumed the risk of interference with the court and what that might entail.

Judgments affirmed.

Francis P. O'Connor for the petitioners.

Warren K. Kaplan, Special Assistant Attorney General (*James W. Bailey*, Assistant Attorney General, with him), for the Commonwealth.